

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 18, 2007

**FRANK A. ARMSTRONG, JR. v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Maury County**  
**No. 12816     Robert L. Jones, Judge**

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**No. M2007-00401-CCA-R3-PC - Filed April 1, 2008**

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The petitioner, Frank A. Armstrong, Jr., appeals from the Maury County Circuit Court's denial of his petition for post-conviction relief from his 2003 jury conviction of second degree murder, for which he was sentenced to a 20-year term in the Department of Correction. The record supports the post-conviction court's determination that the petitioner failed to establish infirmity of the conviction by reason of ineffective assistance of counsel, and we affirm the post-conviction court's order.

**Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Kyle E. Dodd, Pulaski, Tennessee, for the appellant, Frank A. Armstrong, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Larry Nickell, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Following his conviction and sentence, the petitioner appealed, and this court affirmed the judgment of the trial court. *See State v. Frank A. Armstrong, Jr.*, No. M2004-01728-CCA-R3-CD (Tenn. Crim. App., Nashville, Aug. 16, 2005).

The conviction resulted from the October 31, 2001 shooting death of the victim at the petitioner's apartment. *See id.*, slip op. at 2. In his trial testimony, the petitioner admitted to shooting the victim, Daren Sawyer, following a struggle that erupted when the petitioner asked the victim to leave the apartment. *See id.* at 9.

In his June 20, 2006 post-conviction petition, the petitioner claimed his trial counsel was ineffective. In the post-conviction evidentiary hearing, the petitioner testified that, prior to his

trial, his counsel had conferred with him only three or four times and had inadequately advised the petitioner. He testified that counsel did indicate an intention to pursue theories of self-defense and defense of property. He testified that he asked his trial counsel to move for a change of venue, but he did not recall that counsel made such a motion. He cited difficulties in selecting a trial jury due to widespread knowledge about the case. He testified that trial counsel failed to call approximately 30 witnesses who could have testified that the petitioner was an honest, peaceful man. He characterized his counsel's performance by commenting, "I think he did a decent job, but I think he could [have done] better."

On cross-examination, the petitioner admitted that he went to trial on a charge of first degree murder. He admitted that his counsel filed pretrial motions to challenge the admissibility of the results of the petitioner's blood test and to suppress from evidence testimony about the victim's ex-wife receiving a voicemail message from the victim on her cellular telephone. During the recorded message, which had been erased by the telephone company prior to trial, the victim's ex-wife heard the victim pleading with the petitioner to "stop," followed by gunshots and the victim's statement that he was dying.

Trial counsel did not testify in the evidentiary hearing.

The post-conviction court entered written findings of fact. The court found that the petitioner's "testimony and the record indicate that trial counsel had several meetings with the petitioner and several pre-trial hearings on various issues" and that "no evidence [showed] that counsel's time with petitioner was inadequate."

The post-conviction judge, who had been the trial judge, found that voir dire of the jury pool yielded no basis for a change of venue, stating, "Neither the petitioner nor the victim were known to the prospective jurors."

The court determined that trial counsel competently advanced a reasonable defense strategy of justification, based both upon defense of self and of property. The court found, "The justification defenses were fully litigated, and the jury was instructed on the applicable law." The court observed that "the only gunshot wounds to the victim were both in his back," which belied at least a strategy of self-defense. The court stressed that "counsel's efforts resulted in a verdict for second degree murder rather than first. There, again, is no evidence of ineffectiveness of counsel."

The court determined that the petitioner's complaints about the State's using the content of the erased message on the victim's ex-wife's cellular telephone was more of a claim of prosecutorial misconduct that hampered the defense than an instance of ineffective assistance of counsel. At any rate, the petitioner litigated the spoliation of evidence issue on his direct appeal, and the appellate court rejected that as a basis for a new trial.

The post-conviction court, accordingly, denied post-conviction relief, and the petitioner perfected a timely appeal.

On appeal, the petitioner claims that his trial counsel was ineffective in inadequately pursuing a strategy of self-defense. He claims that counsel improvidently changed his strategy to one of defense of property. He points out that such a defense was not beneficial because deadly force is not justified in defending one's property. *See* T.C.A. § 39-11-614(c) (2006). He claims in his brief that counsel's persistence in the claim of self-defense would have resulted in a conviction lesser than second degree murder.

The post-conviction petitioner is obliged to establish his claims by clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2003). On appeal, the appellate court affords the trial court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

The Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "[w]hether the advice given or the service rendered by the attorney [is] within the range of competence demanded by attorneys in criminal cases." *Summerlin v. State*, 607 S.W.2d 495, 496 (Tenn. Crim. App. 1980).

In *Strickland v. Washington*, the United States Supreme Court outlined the requirements necessary to demonstrate a violation of the Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and must demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Constitution. *Id.* at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him and that errors were so serious as to deprive the petitioner of a fair trial, calling into question the reliability of the outcome. *Id.*; *Henley*, 960 S.W.2d at 579.

The court does not "second guess" tactical and strategic choices pertaining to defense matters and does not measure a defense attorney's representation by "20-20 hindsight." *Henley*, 960 S.W.2d at 579 (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Rather, a court reviewing counsel's performance should "eliminate the distorting effects of hindsight . . . [and] evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). On the other hand, "deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *Id.*

To establish prejudice, a party claiming ineffective assistance of counsel must prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

In the present case, the petitioner failed to establish either deficient performance of counsel or that he was prejudiced by counsel’s actions or omissions. The claim that a more vigorous pursuit of the theory of self-defense would have yielded a more favorable verdict is purely speculative, especially in light of the evidence that the petitioner shot the victim twice in the back.

Nothing in the record countervails the post-conviction court’s findings, and we affirm the denial of post-conviction relief.

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JAMES CURWOOD WITT, JR., JUDGE